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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1982

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 610 (AFL-CIO), et al.,

*Petitioners,*

—v.—

PAUL E. SCOTT, et al.,

*Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

## MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF RESPONDENTS

The American Civil liberties Union respectfully moves for leave to file the annexed brief amicus curiae in support of respondents.

The American Civil Liberties Union is a nationwide, non-partisan organization of over 250,000 members dedicated to the

protection of fundamental liberties guaranteed by the Constitution. Security of the person from politically motivated intimidation is a precondition to the enjoyment of our Constitutional heritage. This case raises the question of whether effective federal remedies exist against politically motivated mob violence. In view of the importance of such remedies to the enjoyment of our Constitutional heritage, the American Civil Liberties Union respectfully moves for leave to file the annexed brief amicus curiae in support of respondents.

Respectfully submitted,

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## INTEREST OF AMICUS CURIAE

The interest of amicus curiae is set forth in the foregoing motion for leave to file this brief.

## STATEMENT OF THE CASE

The relevant facts are set forth in petitioners' brief at pp.2-3 and in the decision of the majority below set forth in the Appendix at A-4 through A-6.

## SUMMARY OF ARGUMENT

This case involves an attempt by victims of politically inspired mob violence to assert a federal cause of action for damages against private individuals who beat them because of their beliefs concerning unions. In order to determine whether such a cause of action exists, this Court must confront three questions:

(1) Does Congress possess power to

establish a federal cause of action for politically inspired intimidation; (2) Did the 42nd Congress, in enacting 42 U.S.C. § 1985(3), intend to create such a cause of action; and (3) Were respondents beaten because of their beliefs and associations within the meaning of § 1985(3)?

(a) Congress' power to proscribe private activity which renders it difficult or impossible for persons to formulate and express diverse opinions flows from the affirmative command of Section 5 of the Fourteenth Amendment, as well as the Guarantee Clause and the structural commitment to democratic government which permeates the Constitution.

(b) Congress, in enacting § 1985(3), was attempting to provide an effective remedy for the wave of political terrorism directed at Republicans and their allies in

portions of the South. The 42nd Congress understood that freedom from intimidation in the expression of political views was a privilege and immunity of citizenship which Congress was empowered -- indeed obligated -- to protect against private encroachment. Thus, in enacting § 1985(3), Congress was not intending to establish new rights, but merely to render judicially cognizable fundamental political guarantees independently assured by Section 1 of the Fourteenth Amendment, the Guarantee Clause, the structural imperative of the Constitution and the 42nd Congress' understanding of the Privileges and Immunities Clause. This Court should defer to the intent of the 42nd Congress and construe § 1985(3) as providing effective protection against politically inspired intimidation by private mobs.

c. Respondents were beaten because they elected to work for an employer who declined to sign a collective bargining agreement with petitioners' union. Petitioners' manifest purpose was to punish respondents for actions which manifested a contrary belief or opinion concerning unions. Such violent intimidation based on a victim's beliefs or associations falls within the core coverage of § 1985(3).

## INTRODUCTORY STATEMENT

Security of the person from physical abuse and intimidation because of belief or association is an indispensible pre-condition to the functioning of democracy. When fear of retaliation at the hands of public or private bullies poisons the free exchange of ideas and inhibits the formation of individual opinions, self-government becomes an impossibility.

Under our federal system, primary responsibility for protecting personal security lies with state and local law, since politically motivated violations of personal security will inevitably involve tortious as well as criminal conduct. Unfortunately, however, the passions which lead to politically motivated violations of personal security may infect an entire community, sapping its law enforcement potential and

leaving victims of political persecution without an effective means of redress.

Congress, in an effort to provide a supplemental enforcement mechanism less subject to local influence, has enacted a comprehensive and interrelated system of federal law designed to protect individuals from politically motivated violence or intimidation. Thus, for example, 42 U.S.C. § 1983 and 18 U.S.C. § 242 provide for civil and criminal protection against unconstitutional actions by public officials "taken under color law," while 42 U.S.C. § 1985(3) and 18 U.S.C. § 241 provide significant civil and criminal protection against physical abuse or intimidation at the hands of private individuals based on a

1. See generally Monroe v. Pape, 365 U.S. 167 (1961) (§ 1983) and United States v. Price, 383 U S. 787 (1966) (§ 242).

victim's belief or associations.[2] See generally Dorsen, Bender, Neuborne and Law, Political and Civil Rights in the United States, (4th ed.) vol. II, chapter XXV.

In Collins v. Hardyman, 341 U.S. 651 (1951), the Court seriously impaired the Congressional structure by ruling that 42 U.S.C. § 1985(3) did not apply to the conduct of private persons who used force and intimidation to disrupt a political rally. However, in United States v. Guest, 383 U.S. 745 (1966) and Griffin v. Breckinridge, 403 U.S. 88 (1971), this court repudiated the rationale of Collins and ruled that § 1985(3) and § 241 are applicable to private intimidation designed to deter persons from the full enjoyment of certain constitutionally

2. See generally, Griffin v.Breckinridge, 403 U.S. 88 (1971), (§ 1985(3), and United States v. Guest 383, U.S. 745 (1966) (§ 241).

protected rights.[3]

Finally, in Great American Federal Savings and Loan Ass'n v. Novotny, 442 U.S. 366 (1979), this Court ruled that § 1985(3) was not designed to create rights, but to provide a remedy for rights which exist independently of § 1985(3).[4] The

3. The "rights" at issue in Griffin were rights flowing from the abolition of slavery together with all its badges and incidents by the 13th Amendment and the right to interstate travel guaranteed as a privilege and immunity of national citizenship. Since both the 13th Amendment and the Privileges and Immunities clause operate directly upon individuals, the Court found it unnecessary to consider whether rights protected by the 14th Amendment against state action could be secured against private intimidation. 403 U.S. at 105.

4. Novotny involved an attempt to raise a Title VII claim under § 1985(3). This Court ruled that Title VII was the exclusive mechanism for raising claims of employment discrimination by private employers. The Court did not consider whether a § 1985(3) claim would lie against a defendant who was not subject to suit under Title VII. 442 U.S. at 370, n.6

precise question raised by this case is whether in light of Guest, Griffin and Novotny, Collins v. Hardyman was rightly decided on its facts.

This Court noted in Griffin that the intellectual underpinnings of Collins had been eroded, but declined to decide whether, on its facts, the case had been correctly decided. 403 U.S. at 95-96. This case raises squarely the question of whether a federal cause of action exists pursuant to § 1985(3) for violent private activity designed to injure or intimidate another because of the victim's beliefs and associations. In order to answer that question, three issues must be confronted: (1) Does Congress have the power to establish a cause of action for private activity designed to injure or intimidate another because of the victim's beliefs or

associations? (2) Was 42 U.S.C. § 1985(3) intended to establish such a cause of action? and (3) Were respondents beaten because of their beliefs and associations within the meaning of 42 U.S.C. §1985(3)?

## I. CONGRESS IS EMPOWERED TO LEGISLATE AGAINST PRIVATE ACTIVITY DESIGNED TO INJURE OR INTIMIDATE ANOTHER BECAUSE OF A VICTIM'S BELIEFS OR ASSOCIATIONS PURSUANT TO AN OBLIGATION TO ASSURE THE CONTINUED EXISTENCE OF THE PRECONDITIONS FOR REPUBLICAN GOVERNMENT.

In Collins v. Hardyman, 341 U.S.651 (1951), the Court suggested that Congress might lack power to legislate against private activity designed to punish persons for expressing political or social opinions. Cf. The Civil Rights Cases, 109 U.S. 3 (1883); United States v. Harris, 106 U.S. 629(1882); Baldwin v. Franks, 120 U.S. 678 (1887). However, in the years since Collins,

whatever constitutional doubts may have existed as to Congress' power to act against politically motivated mob violence have been resolved squarely in favor of Congress' power to preserve fundamental political rights against private as well as public encroachment. United States v. Guest, 383 U.S. 745 (1966); Katzenbach v. Morgan 384 U.S. 641 (1966);Griffin v. Breckinridge, 403 U.S. 88 (1971). In fact, Congressional power to deal with politically motivated mob violence flows from at least three sources: (1) Section 5 of the 14th Amendment; (2) Article IV, Section 4, the Guarantee Clause; and (3) the structural imperative of democracy which is at the core of our constitutional system.

### A. Section 5 of the Fourteenth Amendment

It was once the law that Congress lacked

power to outlaw private conduct in derogation of Fourteenth Amendment values. Cf. The Civil Rights Cases, 109 U.S. 3 (1883). Since, reasoned the Court in The Civil Rights Cases, the constitutional command of Section 1 of the Fourteenth Amendment is directed solely at the States, Congressional authority under Section 5 must be confined to legislative reinforcement of the commands already contained in Section 1. Such an analysis, which bears a distant resemblance to Justice Stevens' concurrence in Novotny,[5] is premised on a view of the Fourteenth Amendment which lays excessive stress on its prohibitory nature and fails to recognize that the purpose of Section 1 is not merely to issue commands but to assure individual

5. Justice Stevens' Novotny concurrence is discussed infra, at 45-50. It deals, not with Congressional power, but with the extent to which the 42nd Congress elected to exercise its power.

enjoyment of the values which the Fourteenth Amendment was designed to preserve. While Section 1, standing alone, may give rise to enforceable rights solely against state action, Congress may, under Section 5, recognize that additional protection of Fourteenth Amendment values against private encroachment is necessary to assure the realization of the basic purpose of the Fourteenth Amendment. Indeed, unless Congress is empowered to establish causes of action which go beyond the literal language of Section 1 of the Fourteenth Amendment, Section 5 would be largely reduced to surplussage, since civil causes of action for the violation of Section 1 rights would exist independently of any Congressional action. E.g., Bivens v. Six Unknown Agents, 403 U.S. 388 (1971); Monell v. Dept. of Social Services, 436 U.S. 658 (1978). Thus,

legislative power under Section 5 should not be measured merely as a warrant to reiterate existing Section 1 prohibitions, but as an affirmative grant of power to go beyond the literal scope of Section 1 in an effort to advance the ultimate purpose of the Fourteenth Amendment.

Although this Court has not yet explicitly recognized Congress' power under Section 5 to protect Fourteenth Amendment values against private intimidation, six members of the Court in United States v. Guest , 383 U.S. 745 (1966), recognized that Congress possessed power under Section 5 to impose criminal sanctions on private behavior designed to impede the enjoyment of Fourteenth Amendment rights.[6]

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6. The opinion for the Court in Guest construed the indictment in question as alleging state connivance in the scheme. (Continued on next page)

As Justice Brennan noted in his concurrence:

> Viewed in its proper perspective, Section 5 of the Fourteenth Amendment appears as a positive grant of legislative power, authorizing Congress to exercise its discretion in fashioning remedies to achieve civil and political equality for all citizens. 383 U.S. at 784.

Similarly, in Katzenbach v. Morgan, 384 U.S. 641 (1966), this Court ruled that Congress was empowered under Section 5 to ban English language literacy tests for voting in certain settings despite rulings by this Court upholding such tests against Fourteenth

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383 U.S. at 756. However, Justices Clark, Black and Fortas concurred specially on the ground that Section 5 empowered Congress to punish private conspiracies interfering with Fourteenth Amendment rights. 383 U.S. at 761. Justices Brennan, Douglas and Chief Justice Warren concurred in part on the same ground. 383 U.S. at 781-784.

Amendment challenge. In effect, therefore, the Katzenbach Court authorized Congress to go beyond the substantive contours of Section 1 in formulating legislation under Section 5 so long as the legislation was designed to effectuate the fundamental purposes of the Fourteenth Amendment.[7]

Thus, Section 5 of the Fourteenth Amendment provides clear authority for congressional activity designed to cope with politically motivated mob violence which poses a threat to the actual enjoyment of the values which the Fourteenth Amendment was designed to preserve.

B. Article IV, Section 4 -- The Guarantee Clause.

Article IV, Section 4 provides, in part:

7. Katzenbach was recently reaffirmed in Fullilove v. Klutznick, 448 U.S. 448, 476-77 (plurality opinion); 500-01 (Powell, J. concurring) (1980).

> The United States shall guarantee to every State in this Union a republican form of government.

In discussing possible sources of legislative power for the Civil Rights Act of 1871, the 42nd Congress, not surprisingly, stressed the recently enacted Section 5 of the Fourteenth Amendment.[8] However, numerous members of Congress recognized that an additional source of Congressional authority to deal with the epidemic of mob violence which greeted attempts to implement Reconstruction in portions of the South was its duty under Article IV, Section 4, to guarantee to every state a republican form of government. E.g., Cong. Glove, 42nd Cong. 1st Sess. 333-4 (1871) (remarks of (Rep. Hoar); id. at 370 (remarks of Rep. Monroe); id. at 380-1 (remarks of Rep.

8. The Act was entitled "An Act for Enforcement of the Fourteenth Amendment and for other purposes."

Hawley); id. 389-90 (remarks of Rep. Elliot); id. App. at 72-3 (remarks of Rep. Blair). See also id. App. at 159 (remarks of Rep. Golladay) (acknowledging as a Democrat that the Republicans were relying, in part, on the Guarantee Clause).

This Court has, of course, consistently held that the Guarantee Clause fails to provide manageable judicial standards in testing the legitimacy of state governmental action. Thus, in Luther v. Borden, 48 U.S. (7 How.) 1 (1849), this Court declined to decide which of two rival state governments was the true "republican" government of Rhode Island. Following Luther v. Borden, this Court has consistently declined to use the Guarantee Clause as an adjudicatory standard. E.g., Baker v. Carr, 369 U.S. 186, 227-229 (1962).

Recognizing that Guarantee Clause cases

often present non-justiciable political questions does not, however, strip the Guarantee Clause of all meaning. It remains a binding directive addressed to the political branches and, thus, constitutes a significant source of Congressional authority. See e.g., Pacific States Tel & Tel Co v. Oregon, 223 U.S. 118, 142-149 (1912); Highland Farms Dairy v. Agnew 300 U.S. 608 (1937). Indeed, in Texas v. White, 74 U.S. 700 (1869), this Court explicitly relied on the Guarantee Clause as the source of legislative authority to enact much of the Reconstruction legislation of the 39th and 40th Congresses. 74 U.S. at 730-731. More recently, in Laird v. Tatum, 408 U.S. 1, 3-4 n.2 (1972), this Court noted that the companion "domestic violence" provisions of Article IV, Section 4, authorized the enactment by Congress of 10 U.S.C. § 331, empowering the

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President to call out neighboring state militia to suppress an insurrection against a state government.[9]

Thus, although the number of cases in which Article IV § 4 has been before this Court have been few, and these have consistently held the clause to be judicially unenforceable, the decisions have also recognized that the clause does confer important powers on the federal government, exerciseable through its political branches. Of these powers, one scholar wrote:

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9. In United States v. Josephson, 165 F.2d 82, 90 (2d Cir. 1947); Barsky v. United States, 167 F.2d 241, 246-47 (D.C. Cir. 1948); and Morford v. United States, 176 F.2d 54 (D.C. Cir. 1949), the Guarantee Clause was properly invoked as a source of legislative power by the House Un-American Activities Committee, although the courts' review of the validity of the exercise of that power under the First Amendment was distressingly narrow.

> The analysis of the guaranty clause in light of contemporary materials demonstrates that it endowed the federal government with great power which was to be used to preserve republican government. As such it was [prior to the Fourteenth Amendment] the only part of the Constitution that afforded the people any protection against abuses in their state governance. And as previously noted, such a check in the hands of the central authority was deemed essential to the continued welfare of the Union.

Bonfield, The Guarantee Clause of Article IV, Section 4: A Study in Constitutional Desuetude, 46 Minn.L.Rev. 513, 530 (1962) (emphasis in the original.)[10]

10. Professor Bonfield contended that this "great power" might appropriately be exercised by any branch of the federal government, including the judicial branch in appropriate cases, while acknowledging that Luther v. Borden, for instance, was not at all an appropriate case. See also Bonfield, Baker v. Carr: New Light on the Constitutional Guarantee of Republican Governement, 50 Calif. L.Rev. 245 (1962).

The sole question then is whether Congressional legislation designed to protect persons from politically motivated mob violence is an appropriate means of guaranteeing a republican form of government.

The essential role of speech and associational freedoms in a republican government has long been recognized. At the time of the framing of the Constitution, freedom of speech and association held this special place in the constitutional scheme.

> Republicanism meant more for Americans than simply the elimination of a King and the institution of an elective system. It added a moral dimension, a utopian depth, to the political separation from England -- a depth that involved the character of their society.

G. S. Wood, The Creation of the American Republic, 1776-1787, 47 (1969). This moral dimension was defined by Montesquieu as

"virtue," and he called it the essential principle of a republic. Montesquieu, The Spirit of the Laws, Vol. I, Book I, Ch. 1. To most Americans of the revolutionary era, this notion of virtue meant public responsibility. It was a requirement of dedication to the good of the whole and a duty to affirmatively participate in self-government.

> Since in a free government the public good was identical with people's welfare, a "matter of common feeling" and founded in the "common consent" of the people, the best way of realizing that in the Whig mind was to allow the people a maximum voice in the government.

Wood, supra at 56 quoting from Duché, "Duty of Standing Fast," Moore, ed., Patriot Preachers, 82. Individual political activity was thus seen as a requirement of the republican form of government, that is, its essential element. In guaranteeing that form

of government in Article IV, § 4, the framers not only expected full exercise of individual political rights, but in effect, demanded it. In his much-quoted concurring opinion in Whitney v. California, 274 U.S. 357, 375-376, (1927) Justice Brandeis reached the same conclusion:

> Those who won our independence believed . . . that public discussion is a political duty; and that this should be a fundamental principle of the American government.[11]

Thus, the Guarantee Clause provides Congress with the power, if not the duty, to

11. "When men govern themselves, it is they--and no one else --who must pass judgment upon unwisdom and unfairness and danger. And that means that unwise ideas must have a hearing as well as wise ones, unfair as well as fair, dangerous as well as safe, un-American as well as American. . . . The principle of the freedom of speech springs from the necessities of the program of self-government. It is not a Law of Nature or of Reason in the abstract. It is a deduction from the basic American agreement that the public issues shall be decided by universal suffrage." A. Meiklejohn, Free Speech and Its Relation to Self-Government, in Political Freedom 27 (1948).

act against private mobs whose activities prevent Americans from forming and expressing the diverse political opinions without which a republican form of government is meaningless.

C. The Structural Commitment to Democratic Government Inherent in the Constitution

Virtually the entire Constitutional text is implicit with a commitment to representative self-government and democratic values. Ely, Democracy and Distrust (1979). In providing a cause of action to redress the damage caused by politically motivated violations of personal security by private mobs, Congress merely implements the structural imperative of democracy which is at the core of our Constitutional system. C. Black, Structure and Relationship in Constitutional Law (1969). Politically motivated mob violence threatens that structural imperative by rendering it difficult or impossible for

individuals to form opinions and to exchange ideas free from the fear of violent retaliation. Thus, were no other explicit textual support available, Congressional power to legislate in this area would nevertheless flow from Congress' duty to take necessary and proper steps to assure the continued existence of the fundamental pre-requisite to functioning democracy -- freedom from fear in the formation and expression of political views.

Thus, whether one views the issue as an exercise of the powers granted by Section 5 of the Fourteenth Amendment; a discharge of the responsibility imposed by the Guarantee Clause; or a response to the structural imperative of the Constitution itself, Congress' power to act to preserve the preconditions to a functioning democracy by outlawing private terror and intimidation calculated to silence opponents cannot be

seriously questioned. We pass, therefore, to the question of the extent to which the 42nd Congress intended to exercise that power.

## II. CONGRESS, BY ENACTING § 1985(3), INTENDED TO CREATE A FEDERAL CAUSE OF ACTION FOR POLITICALLY INSPIRED INTIMIDATION

### A. The Background Against Which § 1985(3) Was Adopted

The 42nd Congress enacted § 1985(3) against a background of widespread terror imposed by the Ku Klux Klan on persons who supported the policies of the Reconstruction Congresses.[12] Monell v. Dep't of Social Services, 436 U.S. 658, 665 (1978). Unlike the four other Reconstruction era

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12. This Court has elaborately canvassed the facts surrounding the adoption of the Civil Rights Act of 1871 on numerous occasions. See Great American S & L Ass'n v. Novotny, 442 U.S. 366, 370 n.7 (1979). See generally Comment, A Construction of Section 1985(c) in Light of Its Original Purpose, 46 U. Chi.L.Rev. 402, 407-411 (1979)

Civil Rights Acts, the Ku Klux Klan Act was not aimed at granting or securing substantive rights to freedmen. Rather, it was enacted in an attempt to put an end to a wave of politically inspired terrorism directed at Whites and Blacks alike which was sweeping the South. No purpose would be served by a detailed review of Klan violence here. Three points should, however, be emphasized since they shed light on the core purpose of § 1985(3).

First, it was the widespread perception of the 42nd Congress that the Ku Klux Klan and other similar groups were engaged in terrorizing Republican sympathizers throughout the South.

> But one rule never fails: the victims whose property is destroyed, whose persons are mutilated, whose lives are sacrificed, are always Republicans. They may be Black or White; they include

> those who wore the blue and those who wore the gray; newcomers and life-long residents, but only Republicans. Stain the door lintels with the mark of opposition to reconstruction and of hostility to the national Administration, and the destroying angel passes by. Omit that sign, and the torch may kindle the roof that covers women and children; the scourge may fall upon shoulders that stoop with weakness and with age; the bullet may pierce the breast without warning. Such uniformity of result can come only from design. Republicans only are beaten and mutilated and murdered, because the blows are aimed at Republicans only.

Cong. Globe 42nd Cong. 1st Sess. (1871) (hereinafter "Globe") 413 (remarks of Rep. Roberts). See also id. at 157 (remarks of Sen. Sherman); id. at 252 (remarks of Sen. Morton); id. at 437 (remarks of Rep. Cobb); id. at 457 (remarks of Rep. Coburn.[13]

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13. In the debates, Republican speakers also specifically referred to unionists, Blacks and Northerners ("carpetbaggers") as the objects of Klan attacks. See Globe

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Second, the 42nd Congress understood that the motive behind Klan terrorism was not malice, but a calculated desire to punish and deter the exercise of political activity by persons in political disagreement with the Klan. Id. 390-1 (remarks of Rep. Elliot); id. 429-9 (remarks of Rep. Beatty); id. at 457-459 (remarks of Rep. Coburn); id. App. at 184 (remarks of Rep. Platt); id. App. at 248 (remarks of Sen. Morton).

Third, the ultimate goal of the Klan was to realize certain political goals -- at a minimum, the restoration of the hegemony of the Democratic Party in the

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338 (remarks of Rep. Kelly); id. at 384 (remarks of Rep. Hawley); id. at 441 (remarks of Rep. Butler); id. at 459 (remarks of Rep. Coburn); id. App. at 190 (remarks of Rep. Willard); id. App. at 228 (remarks of Sen. Boreman); id. App. at 229 (remarks of Rep. Stevenson). Unionists were attacked because of the hostility of the Klan to their political beliefs. Blacks were in overwhelming numbers members of the Republican Party (id. at 157 (remarks of
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South, and perhaps including the return to power of the Democratic Party on a national level and the repeal of Reconstruction.

There can be no doubt, therefore, that § 1985(3) was enacted in order to provide an effective remedy for widespread private political intimidation.

B. The Text of § 1985(3)

In order to meet the literal textual requirements of § 1985(3), a plaintiff must demonstrate a conspiracy to deprive a person

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Sen. Sherman), and they and carpetbaggers were attacked, not because of racial or sectional animus, but because of their presumed affiliation with the Republican Party. Id. at 443 (remarks of Rep. Butler) ("...the objects of its fury, as to persons, were negroes and northern men who had gone South, the only friends of republican liberty...").

or class of persons of equal privileges and immunities under the law. Thus, the literal text of § 1985(3) poses no barrier whatever to its application to private activity. Indeed, when one reviews the evolution of the text, its applicability to private political intimidation becomes manifest.

Throughout the debates, it was repeatedly asserted that the term "privileges and immunities" as used in §1985(3) included free speech and association as a principal component. E.g., Globe 414; (remarks of Rep. Roberts); id. at 476 (remarks of Rep. Dawes); id. App. at 265 (remarks of Rep. Barry). See also Id. App. at 81 (remarks of Rep. Bingham).[14] Moreover, under then

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14. The principal speech describing the scope of the term "privileges and immunities" was delivered by Rep. Maynard who, as a member of the 39th Congress, had participated in the passage of the 14th Amendment. Globe 310. He stressed the relationship between privileges and immunities and political activity.

contemporaneous usage, the term privileges and immunities as debated and enacted by the 42nd Congress clearly included the freedom to speak and associate. As generally understood in 1871, the term privileges and immunities encompassed the broad spectrum of rights described in Corfield v. Coryell, 4 Wash. Cir. Rpts. 380 (1823). See Slaughter-house Cases, 83 U.S. (16 Wall.) 36, 79, 118-19 (1873) (suggesting that speech and associational rights were privileges and immunities of citizenship). Of course, subsequent decisions of this Court rejected the argument that rights of free speech and association are privileges and immunities of national citizenship. See Logan v. United States, 144 U.S. 263, 286-87 (1892) explaining United States v. Cruikshank, 92 U.S. 542 (1876). However, merely because this Court has construed a constitutional phrase narrowly does not preclude Congress from utilizing it in a broader

sense.[15] Where, as here, Congress used a phrase with a broad contemporaneous meaning, subsequent Supreme Court contractions of that meaning cannot be permitted to frustrate the obvious legislative purpose to provide protection against political terrorism. Indeed, it was precisely the common understanding of the breadth of the phrase "privileges and immunites" which precipitated the appearance of the major limiting factor in § 1985(3) -- the requirement that the defendants conspire to deprive a person, not merely of privileges and immunities, but of equal privileges and immunities because of a class based animus.

As originally introduced, § 1985(3) contained no requirement of a deprivation

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15. Two notable examples of the differing meanings which may be applied to the same phrase used in both a constitutional and a statutory context are the differential constructions of "arising under" in Article III and 28 U.S.C. § 1331 and the minimum and maximum diversity readings given to the same language in Article III and 28 U.S.C. § 1332.

of equal privileges and immunities or a class based animus. Given the breadth of the concept, several legislators feared that the statute would create a virtual federal criminal code since any serious crime would deprive the victim of one or another privilege or immunity as defined in Corfield v. Coryell. E.g. Globe App. 67 (remarks of Rep. Shellabarger); id. at 334 (remarks of Rep. Hoar); id. at 370 (remarks of Rep. Monroe); id. at 500 (remarks of Rep. Freylinghuysen); id. App. at 229 (remarks of Rep. Boreman). See generally Globe App. 188-89 (remarks of Rep. Willard). In response to such concern, § 1985(3) was amended to require more than a mere deprivation of a privilege or immunity; a successful plaintiff must prove class based animus leading to a deprivation of equal privileges and immunities. The obvious purpose of the narrowing

amendment was to limit § 1985(3) to its core concern. It was precisely because Republicans were being singled out for Klan intimidation that § 1985(3) was enacted. By adding the narrowing requirement, Congress assured that only persons or groups being singled out for intimidation because of their beliefs or associations or their race would fall within its coverage. Thus, ordinary crimes or torts without political or racial overtones would not fall within the narrowed § 1985(3) because no purpose to deny the victim equal privileges or immunities could be established. Politically motivated crimes or torts characteristic of the Klan would, however, become prime candidates for § 1985(3) and § 241.

Where, as here, the literal text; the contemporaneous meaning of the terms; and the internal evolution of the statute

each coincide with the statute's manifest purpose to curb political terrorism, this Court should recognize that the 42nd Congress elected to exercise its constitutional power to protect free speech and association against intimidation and violence at the hands of private persons.

C. The Role of Legislative History

In an attempt to avoid the literal meaning of § 1985(3), petitioners seek to use a selective reading of the statute's legislative history to suggest a requirement of state involvement before § 1985(3) becomes applicable to political terrorism. According to petitioners' theory, a group of moderate Republicans, led by Rep. Garfield, wrongly believed that Congress lacked constitutional power to regulate the conduct of private individuals and insisted upon an across-the-board "state involvement" requirement as the price of their balance

of power support. See Globe App. 153 (remarks of Rep. Garfield).

The most obvious flaw in petitioners' theory is its utter lack of textual support. Unlike § 1983 and § 242 which include explicit state involvement requirements, § 1985(3) is absolutely silent on the need for governmental involvement. Moreover, petitioners' assertion that the narrowing amendment which resulted in the addition of the requirement of a denial of equal privileges and immunities was designed to establish a requirement of state involvement was unanimously rejected by this Court in Griffin. Finally, even if petitioner made a persuasive case that a bloc of moderate Republicans read § 1985(3) as requiring a degree of state involvement -- petitioner does not make such a case[16] -- it is unclear why the intention

16. Petitioner's champion, Rep. Garfield, followed an erratic path, supporting the
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of a small bloc of Congressmen should be given predominant effect. The Civil Rights Act of 1871 passed on a straight party vote with both moderate and Radical Republican support. It is impossible to determine which faction compromised its views or the extent to which individual members of Congress were satisfied with the outcome.

More fundamentally, however, petitioners' appeal to legislative history to frustrate a textually appropriate reading of § 1985(3) which advances its core purpose asks the wrong question. Where, as here, plausible legislative history may be adduced for virtually any reading of a statute, the Court's focus should not be on conducting

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1870 Act, opposing the 1871 Act and, finally, supporting the more inclusive 1875 Act. See Globe App. 153-154 (remarks of Rep. Shellabarger). See also Flack, The Adoption of the Fourteenth Amendment 249 (1908). His chief supporters were no more consistent.

a retrospective head count of the 1871 Congress in an attempt to ascertain how a majority might have voted on the issue of whether § 1985 (3) covers politically inspired mob violence. Rather, the Court should ascertain the "core purpose" of § 1985(3) and adopt the construction of § 1985(3) which best advances that core purpose, so long as it accords with the literal text and so long as it does not conflict with clearly articulated legislative history. See United Steel Workers v. Weber, 443 U.S. 193 (1979).

The "core purpose" of § 1985(3) is not open to serious doubt. It was to provide a federal remedy for politically motivated terrorism. The construction of § 1985(3) which best advances that core purpose is to read the phrase "equal privileges and immunities" as encompassing the exercise of political rights free from the threat of politically inspired intimidation. Neither the text of § 1985(3) nor its legislative

history conflicts with such a purposive reading of the statute. Since reading § 1985(3) as applying to private political intimidation raises no Constitutional problems and advances the statute's core purpose, while respecting its literal text and legislative history, petitioners' elaborate attempt to poll the 42nd Congress on what the alleged balance of power bloc probably intended when it voted for the bill is simply irrelevant.

### D. The Relevance of Justice Stevens' Concurrence in Novotny

In his concurrence in Novotny, Justice Stevens noted that, since § 1985(3) was not intended to establish new rights, but was merely intended to provide a judicially enforceable remedy for existing rights, a putative § 1985(3) plaintiff must identify an independent federal right already protected by the Constitution itself or created

by federal statute. See United States v. Johnson, 390 U.S. 563 (1968). When Fourteenth Amendment rights are at issue, Justice Stevens noted that the direct prohibitions of Section 1 operate solely on state action. Thus he reasoned a § 1985(3) plaintiff may not invoke Section 1 of the Fourteenth Amendment as the source of his independent federal right to be free from private intimidation.[17] However, when politically inspired coercion or intimidation is at issue, there are at least three sources of federal law which satisfy Justice Stevens' insistence upon an independent federal source of law for which § 1985(3) porvides merely a remedy.

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17. The search for an independent federal source of law required by Justice Stevens' Novotny analysis is similar to the "arising under" problem in determining whether federal jurisdiction exists. See Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59 (1978); Bivens v. Six Unknown Agents 403 U.S. 388 (1971). See also Paul v. Davis 424 U.S. 693 (1976).

First, since the principal purpose of § 1985(3) was to secure the enjoyment of free political belief and association by persons in sympathy with the Republican Party in the South, the "equal privileges and immunities" language of § 1985(3) should be read as providing victims of Klan oppression with a judicially enforceable remedy designed to implement rights which the 42nd Congress believed were latent in the Privileges and Immunities Clause of the Constitution itself. Thus, if it is true that 42nd Congress did not intend § 1985(3) to create "new" rights, it is only because Congress intended to protect political and associational rights which it believed were already protected against private encroachment by the Privileges and Immunities Clause and a broad conception of the

Fourteenth Amendment. Thus, one source of a § 1985(3) plaintiff's right to be free from private political intimidation is the privileges and immunities language of § 1985(3) itself, as it was understood by the 42nd Congress which enacted it.

Second, the federal right to be free from private political intimidation may be derived from Article IV, Section 4. As amicus has demonstrated, the existence of a "republican form of government" is totally undermined when persons are fearful of expressing diverse opinions because of private intimidation. While the difficulty in formulating manageable judicial standards for the Guarantee Clause argues against the recognition of Bivens claims based directly upon Article IV, § 4, the Guarantee Clause does provide a source of federal right to free political belief and association which may be legislatively activated and transformed

into a judicially enforceable right. In enacting § 1985(3), the 42nd Congress intended precisely such a result.

Finally, the source of a federally recognized right to be free from politically inspired mob terrror may be located in the structural commitment to democracy which permeates the entire Constitution. Even in the absence of the explicit wording of the Guarantee Clause, the body of the Constitution is implicit with a promise of democratic government which cannot be fulfilled under conditions of politically inspired coercion and intimidation. While the structural logic of the Constitution, standing alone, may not be sufficient to ground a judicially enforceable right[18] surely it suffices to anchor a legislative enactment specifically intended

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18. See generally C. Black, Structure and Relationship in Constitutional Law (1969).

to make it judicial cognizable.

Thus, given the sources of law both in §1985(3) itself and latent in the Constitution, only an excessively mechanical reading of the relationship between § 1985(3) and "state action" would result in the refusal to recognize a judicially cognizable § 1985(3) claim for private political intimidation.

## III. RESPONDENTS WERE BEATEN BECAUSE OF THEIR BELIEFS AND ASSOCIATIONS WITHIN THE MEANING OF § 1985(3)

Amicus has argued that Congress possesses clear Constitutional authority to outlaw politically motivated mob violence and that the 42nd Congress intended to exercise that power in an effort to halt Klan terrorism directed at Republican sympathizers. The sole remaining question is whether petitioners' activities constituted the type of mob violence for which § 1985(3) was intended

to provide a federal remedy.

Petitioners beat respondents when they sought to work in a non-union shop. Obviously, the degree of violence and intimidation used by petitioners falls clearly within the intended coverage of § 1985(3).[19]

Similarly, amicus suggests, attempts to intimidate employees into joining -- or not joining -- a labor union are within the intended scope of § 1985(3). The local passions engendered by a bitter labor dispute are no less likely to threaten the even-handed administration of justice at the local level than classic political disputes. The sole question in deciding whether respondents were the victims of class-based discriminatory animus within the meaning of Griffin should

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19. It is, therefore, not necessary for the Court to consider the extent to which non-violent forms of intimidation fall within the coverage of § 1985(3).

be whether they were attacked because petitioners concluded that they adhered to a point of view about unions which petitioners found distasteful. Whether a victim is singled out for intimidation because he is a Republican, a Communist, a union member, or a foe of labor unions, § 1985(3) provides a much needed supplemental federal remedy for private attempts to interfere with free political expression or association.

## CONCLUSION

Respondents do not argue for the establishment of a general federal law of torts. Rather, respondents seek merely the enforcement of the core of § 1985(3) -- the provision of federal relief from politically inspired mob terror. Indeed, if petitioners' conduct does not fall within § 1985(3), the work of the 42nd Congress will be trivialized and the Congressional attempt to establish

an effective remedy against political terrorism will be reduced to a prohibition against attacking Blacks travelling on interstate highways. While such a prohibition is, of course, worthwhile, it is a far cry from the ambitious efforts of the 42nd Congress to stem the depredations of the Ku Klux Klan.

The decision of the Court below should be affirmed.

Respectfully submitted,

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